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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

APPELLANT'S RESPONSE TO APPELLEE'S CONDITIONAL MOTION FOR LEAVE TO FILE BRIEF AFTER ARGUMENT

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On direct appeal to the Supreme Court of Mississippi, appellant squarely invoked the Due Process Clause of the Fourteenth Amendment in support of its argument that "[t]he threat of unrestricted punitive damage awards . . . has a substantial 'chilling effect' [and that] [t]his threat of unlimited punishment constitutes an oppressive influence on an insurer's decision whether to contest any claim." J.S. App., 135a. Due process challenges to the unlimited discretion of the jury in determining the magnitude of the punitive damage award were reiterated in the rehearing petition and supporting brief. J.S. App., 138-39, 150-51a. In its opening brief in this Court, appellant made quite clear that the heart of its federal constitutional claim arose

from the anomaly "under which appellant had the worst of both worlds—civil process and exposure to a potentially unlimited fine . . . ." Br. of Appellant, at 15. As appellant argued, "the maximum amounts in which punitive damages may be assessed . . . are . . . not circumscribed by . . . meaningful legislative judgments." *Id.*, at 12. In that brief, appellant also argued at length, *id.*, at 36-39, that the historical antecedent of punitive damage awards in the English system—amercements—were determined by the peers of the persons to be amerced *only* after a maximum potential amercement had been established by the English courts:

> The function of these peers was not, as was true of the jury in this case, to set the maximum possible punishment and then to impose it based upon . . . their unbridled emotions . . . ."

Br. of Appellant, at 37.

In his merits brief, appellee purported to respond to the foregoing argument by asserting that the "excessiveness" of amercements "was not measured by reference to legislatively fixed momentary judgments," Br. of Appellee, at 37, and by asserting that these same English juries "had unlimited discretion to determine the appropriate amount of the amercement . . . ." *Id.*, at 38.[1] In reply to this argument made by appellee, appellant brought additional authorities to the attention of this Court and reiterated its position that "punishment administered in arbitrary, purely visceral amounts by juries is fundamentally inconsistent with our constitutional system." Reply

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[1] In his brief, appellee characterized appellant's argument as an attempt to establish that the maximum size of amercements was "legislatively fixed." Br. of Appellee, at 39. Appellant's point, however, was broader, encompassing the proposition that English judges established "caps" on these punitive awards in advance, whether by reference to the equivalent of legislative judgments or by reference to "local rules or customs . . . ." Br. of Appellant, at 37.

Br. of Appellant, at 16. Appellant's position in its Reply Brief is substantively indistinguishable from its federal challenge to this award which was expressly grounded in the Due Process Clause of the Fourteenth Amendment on direct appeal of this case to the Supreme Court of Mississippi.

Despite the foregoing, appellee now asserts in his motion either that appellant has never raised a federal constitutional challenge to the power of juries to award punitive damages in unlimited sums or, apparently in the alternative, that that argument has been "abandoned" by appellant. To the contrary, and as any fair reading of the merits briefs filed in this case by the parties demonstrates, appellant pressed this federal challenge in the Supreme Court of Mississippi and in this Court *and* this challenge has been fully briefed and argued to this Court. Moreover, this question is subsumed within appellant's Eighth Amendment challenge to this punitive damage award. It was fully briefed and argued as an aspect of the Eighth Amendment challenge, and this Court may proceed to decide it without further briefing.

In essence, appellee's motion is nothing more than an attempt to convince the Court that there is some distinction to be drawn between resolution of the constitutionality of the punitive damage award in this case under the Excessive Fines Clause or directly under the Due Process Clause of the Fourteenth Amendment. Appellant did not understand the Court's questions to suggest such a distinction,[2] which would in any event be one of form, not substance. Appellee's motion should be denied.

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[2] Appellant understood the Court's questioning as an attempt to identify the narrowest possible basis upon which to ground the potential reversal of the punitive damage award. If appellant is correct, that question is one for the Court to resolve and is of only indirect interest to the parties to this case.

December 3, 1987

Respectfully submitted,

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